

***TESTIMONY OF ENVIRONMENTAL REVIEW APPEALS COMMISSION  
BEFORE SENATE FINANCE COMMITTEE***

***MAY 5, 2011 at 9:00 A.M.***

CHAIRMAN WIDENER, MEMBERS OF THE SENATE FINANCE COMMITTEE,  
MY NAME IS LISA ESCHLEMAN, CHAIR OF THE ENVIRONMENTAL REVIEW  
APPEALS COMMISSION.

THE COMMISSION IS A THREE MEMBER BODY APPOINTED BY THE  
GOVERNOR TO STAGGERED SIX YEAR TERMS. MEMBERS OF THE COMMISSION  
POSSESS SIGNIFICANT LITIGATION EXPERIENCE, ENVIRONMENTAL EXPERTISE,  
AND KNOWLEDGE OF THE EXTENSIVE AND COMPLEX STATE AND FEDERAL  
ENVIRONMENTAL LAWS.

THE COMMISSION HAS EXCLUSIVE, ORIGINAL JURISDICTION OVER  
APPEALS OF SPECIFIED FINAL ACTIONS TAKEN BY THE DIRECTOR OF THE OHIO  
ENVIRONMENTAL PROTECTION AGENCY, THE DIRECTOR OF THE OHIO  
DEPARTMENT OF AGRICULTURE, THE STATE FIRE MARSHAL, THE STATE  
EMERGENCY RESPONSE COMMISSION, AND APPROVED COUNTY AND LOCAL  
BOARDS OF HEALTH.

DECISIONS OF THE COMMISSION ARE DIRECTLY APPEALABLE TO THE  
COURTS OF APPEALS. THUS, THE COMMISSION EFFECTIVELY SITS IN LIEU OF A  
COURT OF COMMON PLEAS FOR ENVIRONMENTAL APPEALS THROUGHOUT THE  
STATE, WHICH ALLOWS FOR THE DEVELOPMENT OF A CONSISTENT, STATEWIDE  
BODY OF ENVIRONMENTAL LAW FOR OHIO. THIS STATUTORILY CREATED  
SYSTEM PROVIDES THE REGULATED COMMUNITY AND AGGRIEVED CITIZENS AN  
IMPORTANT AND RELATIVELY COST-EFFECTIVE MECHANISM FOR INDEPENDENT

RESOLUTION OF HIGHLY TECHNICAL AND SCIENTIFICALLY COMPLEX ENVIRONMENTAL ACTIONS TAKEN BY STATE AND LOCAL AGENCIES WITHIN THE COMMISSION'S JURISDICTION.

THE COMMISSION CONDUCTS AND ISSUES FINAL OPINIONS FOR ALL DE NOVO HEARINGS AND ALSO HEARS ORAL ARGUMENTS AND ISSUES DECISIONS ON ALL RECORD APPEALS FILED AFTER AN ADJUDICATORY HEARING HAS BEEN HELD BELOW. IN ADDITION, THE COMMISSION REVIEWS AND ISSUES WRITTEN DECISIONS ON DISPOSITIVE MOTIONS, INCLUDING MOTIONS TO DISMISS AND MOTIONS FOR SUMMARY JUDGMENT. THE COMMISSION ALSO ROUTINELY ISSUES RULINGS ON A WIDE VARIETY OF DISCOVERY AND EVIDENTIARY DISPUTES, INCLUDING MOTIONS TO COMPEL DISCOVERY, MOTIONS FOR PROTECTIVE ORDER, AND MOTIONS IN LIMINE. THESE AND OTHER PROCEDURAL ISSUES MUST BE RULED UPON PRIOR TO THE FORMAL DE NOVO HEARING AND ARE EXTREMELY TIME CONSUMING FOR THE COMMISSION MEMBERS TO RESOLVE.

CURRENTLY, THE COMMISSION'S DOCKET REFLECTS 365 OPEN CASES. THE NUMBER OF APPEALS FILED, AS WELL AS THE NUMBER OF HEARINGS HELD EACH YEAR, VARIES WIDELY DEPENDING UPON THE NUMBER AND TYPE OF FINAL ACTIONS ISSUED BY THE REGULATING ENTITIES WHOSE ACTIONS ARE SUBJECT TO THE COMMISSION'S JURISDICTION. THE AVERAGE DE NOVO HEARING LASTS APPROXIMATELY ONE WEEK. HOWEVER, IN DECEMBER 2010, THE COMMISSION CONDUCTED A FOUR WEEK DE NOVO HEARING.

ALTHOUGH THE VAST MAJORITY OF OUR CASES ARISE FROM FINAL ACTIONS TAKEN BY THE DIRECTOR OF THE OHIO EPA, WE CONTINUE TO SEE AN INCREASE IN THE NUMBER OF CASES ARISING FROM ACTIONS TAKEN BY THE STATE FIRE MARSHAL AND LOCAL BOARDS OF HEALTH.

THE COMMISSION'S FINAL OPINIONS ARE LEGALLY AND TECHNICALLY COMPLEX AND REQUIRE EXTENSIVE RESEARCH AND DRAFTING, ALL OF WHICH IS DONE EXCLUSIVELY BY THE COMMISSION MEMBERS. OUR OPINIONS ARE STATUTORILY REQUIRED TO CONTAIN FINDINGS OF FACT AND CONCLUSIONS OF LAW AND GENERALLY RANGE FROM 30 TO WELL-OVER 100 PAGES IN LENGTH. THE NUMBER AND COMPLEXITY OF RULINGS ON PROCEDURAL AND DISPOSITIVE MOTIONS ALSO HAVE INCREASED DRAMATICALLY AND THESE WRITTEN DECISIONS OFTEN EXCEED 25 PAGES.

THE COMMISSION IS A THREE LINE-ITEM AGENCY SOLELY FUNDED BY THE GENERAL REVENUE FUND. THE BUDGET REQUEST, AS RECOMMENDED BY THE GOVERNOR, WILL ENSURE THAT THE COMMISSION WILL MEET ITS STATUTORILY MANDATED DUTIES.

A BRIEF DISCUSSION OF THE COMMISSION'S STAFFING HISTORY PROVIDES PERSPECTIVE UNDERLYING THIS REQUEST. WHEN ESTABLISHED IN 1972, THE COMMISSION HAD A STAFF OF FOURTEEN INDIVIDUALS, INCLUDING 3 STAFF ATTORNEYS, 3 LEGAL RESEARCH ASSISTANTS, AND 5 ADMINISTRATIVE SUPPORT PERSONNEL. THROUGHOUT THE 1970s AND 1980s, THE COMMISSION EMPLOYED AT LEAST 1 STAFF ATTORNEY, 1 RESEARCH ASSISTANT, AND MISCELLANEOUS ADMINISTRATIVE SUPPORT PERSONNEL. SIGNIFICANTLY, AT

THE SAME TIME COMMISSION STAFF WAS BEING REDUCED, THE LEGISLATURE CONTINUED TO EXPAND THE COMMISSION'S JURISDICTION. DUE TO PRIOR BUDGET CONSTRAINTS, THE COMMISSION REDUCED STAFF TO ITS PRESENT COMPOSITION OF THREE COMMISSIONERS, ONE EXECUTIVE DIRECTOR, AND ONE CLERICAL STAFF MEMBER. THE COMMISSION DOES NOT HAVE FUNDING TO EMPLOY HEARING EXAMINERS, STAFF ATTORNEYS, OR LAW CLERKS.

IN COMPARISON, BASED UPON OUR EVALUATION OF PUBLICLY AVAILABLE INFORMATION, STATES WITH SYSTEMS SIMILAR TO OHIO IN WHICH APPEALS OF ACTIONS OF THE STATE ENVIRONMENTAL PROTECTION AGENCY ARE HEARD AND DECIDED BY A COMMISSION OR HEARING BOARD WITH STATEWIDE EXCLUSIVE JURISDICTION, THE NUMBER OF COMMISSIONERS RANGES FROM 5 TO 16. IN A FEW STATES, THERE ARE MULTIPLE COMMISSIONS STRUCTURED BY SUBJECT AREA SUCH AS AIR, WATER, LAND USE, AND HAZARDOUS WASTE, WITH AT LEAST 3 COMMISSIONERS APPOINTED TO EACH COMMISSION.

ALTHOUGH INFORMATION REGARDING THE TOTAL NUMBER OF SUPPORT STAFF AND BUDGETS FOR THESE COMMISSIONS IS NOT READILY AVAILABLE, OUR REVIEW CONFIRMED THAT IN ALL STATES, THE COMMISSION IS ASSISTED BY STAFF ATTORNEYS, HEARING EXAMINERS, AND ADMINISTRATIVE PERSONNEL, INCLUDING PARALEGALS AND RESEARCH ASSISTANTS. FOR EXAMPLE, PENNSYLVANIA'S ENVIRONMENTAL REVIEW BOARD IS STRUCTURED SIMILAR TO OHIO'S, BUT HAS 5 FULL TIME MEMBERS. PENNSYLVANIA'S BOARD

HAS A SUPPORT STAFF OF 16 INCLUDING STAFF ATTORNEYS, SECRETARIES, AND ADMINISTRATIVE ASSISTANTS.

THE COMMISSION ALSO LACKS FUNDS TO REPLACE AGING AND OUTDATED EQUIPMENT INCLUDING, COMPUTERS, MONITORS, AND PRINTERS USED BY THE COMMISSIONERS TO CONDUCT RESEARCH AND DRAFT OPINIONS. THE ENVIRONMENTAL PROTECTION AGENCY PROVIDES THE COMMISSION WITH EQUIPMENT IT NO LONGER USES AND MAINTAINS IN STORAGE. FURTHER, THE COMMISSION LACKS FUNDS TO DEVELOP AN ELECTRONIC CASE MANAGEMENT SYSTEM. AS A RESULT, ALL DOCKETING AND CASE MANAGEMENT IS DONE MANUALLY. THE COMMISSION RECOGNIZES THAT IMPLEMENTATION OF AN ELECTRONIC CASE MANAGEMENT SYSTEM MAY BE BEYOND CURRENTLY AVAILABLE RESOURCES, BUT BELIEVES THAT FUTURE IMPLEMENTATION OF SUCH A SYSTEM WILL BE AN IMPORTANT STEP IN PROVIDING EFFICIENT AND COMPREHENSIVE SERVICES TO THE ATTORNEYS, REGULATED COMMUNITY, AND CITIZENS WHO APPEAR BEFORE THE COMMISSION.

DESPITE ABSENCE OF TECHNOLOGY EFFICIENCY, THE COMMISSION HAS ESTABLISHED AN ASSERTIVE CASE MANAGEMENT SYSTEM TO ENSURE THAT ALL PARTIES ARE CONTINUOUSLY MOVING THEIR CASES FORWARD TOWARD A RESOLUTION. IN A MAJORITY OF CASES, THE PARTIES REQUEST CASE MANAGEMENT SCHEDULES THAT RANGE FROM 18-24 MONTHS DEPENDING UPON THE COMPLEXITY OF THE ISSUES INVOLVED AND MAGNITUDE OF DISCOVERY REQUIRED.

DUE TO THE REDUCTION IN STAFFING AND THE INCREASINGLY COMPLEX AND PROTRACTED NATURE OF ENVIRONMENTAL LITIGATION, THE TIME REQUIRED FOR THE COMMISSION TO ISSUE THE STATUTORILY REQUIRED FINDINGS OF FACT AND CONCLUSIONS OF LAW HAS DRAMATICALLY INCREASED OVER THE LAST DECADE. THIS SITUATION IS FURTHER EXACERBATED BY THE INCREASINGLY HIGH PROFILE NATURE OF ONGOING LITIGATION, A SUBSTANTIAL INCREASE IN THE NUMBER OF CASES THAT REQUIRE IMMEDIATE DISPOSITION, AS WELL AS A DRAMATIC GROWTH IN ITS DISPOSITIVE AND DISCOVERY MOTIONS DOCKET. WITHOUT ADDITIONAL RESOURCES, THE COMMISSION ANTICIPATES THAT THE LENGTH OF TIME NECESSARY TO ISSUE OPINIONS IN PENDING APPEALS WILL CONTINUE TO INCREASE. HOWEVER, WITH THE BUDGET, AS RECOMMENDED BY THE GOVERNOR, THE COMMISSION ANTICIPATES THAT THE LENGTH OF TIME TO ISSUE AN OPINION WILL BE REDUCED FROM 12-24 MONTHS TO AN APPROXIMATE AVERAGE OF 180 DAYS.

TO MEET ITS STATUTORILY MANDATED DUTIES, THE COMMISSION RESPECTFULLY REQUESTS THAT THE RECOMMENDED BUDGET BE APPROVED.

THANK YOU FOR THE OPPORTUNITY TO TESTIFY. I AM HAPPY TO ANSWER ANY QUESTIONS YOU MAY HAVE REGARDING THE COMMISSION'S BUDGET.